View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Brigham Young University Law School

Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

State of Utah v. Thomas F. Dyer : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Ronald R. Stanger; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

Recommended Citation
Brief of Respondent, *State v. Dyer*, No. 18337 (Utah Supreme Court, 1983).
https://digitalcommons.law.byu.edu/uofu_sc2/3032

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18337
THOMAS P. DYER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction of Negligent Homicide in the Fourth Judicial District Court in and for Utah County, the Honorable J. Robert Bullock, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

RONALD R. STANGER
42 North University Avenue
P.O. Box 477
Provo, UT 84601

Attorney for Appellant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Cases Cited

Statutes Cited

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. ~~18337~~
THOMAS P. DYER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction of Negligent Homicide in the Fourth Judicial District Court in and for Utah County, the Honorable J. Robert Bullock, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

RONALD R. STANGER
42 North University Avenue
P.O. Box 477
Provo, UT 84601

Attorney for Appellant

FILED
MAR 30 1983
18377
Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18337
THOMAS P. DYER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was originally charged with Murder in the second degree, a first-degree felony, in violation of Utah Code Ann. § 76-5-203 (1953), as amended, in the shooting death of Nina Marie Fuelleman. The charge was later amended to manslaughter, a second-degree felony, in violation of Utah Code Ann., § 76-5-205 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried without a jury on March 3 and 4, 1982, the Honorable J. Robert Bullock presiding, in the Fourth Judicial District Court. Appellant was convicted of manslaughter on March 4, 1982. Sentence of one year in the Utah County Jail and a $1,000 fine were imposed on March 26, 1982. A Certificate of Probable Cause was granted on April 13, 1982 and execution of the sentence stayed pending this appeal.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the court below.

STATEMENT OF THE FACTS

On the evening of August 20, 1982, appellant, his brother Rob, and Nina Fuelleman went to a private club in American Fork for cocktails (R. 286). All three drank and Rob testified that he was mildly intoxicated, but that appellant "was in the bag" (R. 286, 304). On the way home, at approximately 1:00 to 1:15 a.m. of August 21, appellant drove the car (R. 287, 288). When the three reached the house in which appellant and Rob lived, appellant announced he was going to his girlfriend's home and Rob took the car keys away from him (R. 284, 288). An argument ensued in which appellant threw money and crumpled checks at Rob (R. 289). Rob grabbed appellant by the throat because he "couldn't get a word in edgewise" and proceeded to strangle and hit appellant (R. 289-290). A neighbor testified that she heard male voices coming from Rob and appellant's house at approximately 1:30 a.m., a minute or two after she observed people getting out of a car and entering the house (R. 277, 278). The voices were saying "I'm going to get this Fucking thing over with. I'm tired of being lied to." " I haven't been lying to you." "The Fuck you haven't" (R. 279).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

After hitting appellant several times, Rob let him go because he "felt sorry for taking advantage of him" (R. 290). Less than 30 seconds after the fighting stopped, Rob went to the doorway of appellant's bedroom and saw him backing out of the closet with a gun in his hand (R. 291-292). The gun was a 30-30 caliber Winchester Western rifle (R. 314). Approximately 10 seconds later, Rob saw the gun explode (R. 294). Appellant was standing near a dresser, the top drawer of which was standing open when the police officers arrived, when the shot was fired (R. 240-241, 292). The drawer contained two spent cartridges and a box of 30-30 caliber ammunition (R. 241). On the floor, near the closet, was a gun scabbard (R. 239; see also Exhibit 14). Rob testified that the gun was held above appellant's hip but below his shoulder (R. 297). Rob did not see or hear the gun being loaded or cocked nor did he remember anything being said by anyone during that time (R. 297). The neighbor testified that she heard a male voice say "Fuck. Not that. Not that. Oh, my god, not that" just before she heard the gunshot (R. 280).

When the gun fired, the bullet struck the door frame approximately 5 feet above the floor (R. 246). After passing through the door frame, the jacket separated from the slug (R 247). The jacket struck Nina Fuelleman in the face and the slug stuck in the opposite wall and later fell to the floor (R. 219, 225, 240). Rob testified that Nina had been upstairs

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

during the fight and that he was not aware she had come downstairs until he saw her on the floor after the shot (R. 299). The gun had been pointed in Rob's direction when it fired, and the bullethole in the door frame was only two feet from him (R. 298, 312). Rob said, however, that he was never frightened and that the argument was over by the time he went to appellant's bedroom (R. 308-309, 311).

A gunsmith testified that the gun involved was in perfect condition (R. 263). The trigger pull had been lightened by a gunsmith from the factory setting but was average for a rifle that had been worked on by a gunsmith (R. 263, 266). Many rifles have trigger pulls that are as much as one pound lighter than this one (R. 266). The trigger pull was heavy enough that it would take a conscious effort to pull the trigger (R. 263). The rifle couldn't be fired without pulling the trigger and the hammer wouldn't fall without pulling the trigger (R. 268).

Appellant at first told the police that he and Rob were discussing the deer hunt and admiring the gun when it went off accidentally (R. 209, 300), but appellant did not testify at trial. Rob, however, said that he heard appellant tell that story to the police, that it was not true, and that he was surprised when appellant said it (R. 300). Exhibits 17, 18 and 19 show that the line of fire based on the angle of the bullethole through the wall would be consistent with the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

rifle being held at or just below the shoulder in an aimed position. Conflicting testimony was given indicating that the gun may have been held in a lower position when it fired (R. 329).

ARGUMENT

POINT I

THE TRIAL COURT MAY, AT ITS DISCRETION, CONSIDER A LESSER INCLUDED OFFENSE WHETHER REQUESTED BY DEFENSE COUNSEL OR NOT.

Appellant assigns error to the trial court's consideration of a lesser offense included within the offense charged because, appellant asserts, it denied him the benefit of resting on his theory of the case; i.e., that he was totally innocent of any wrongdoing. Such an attempt at alleging error has previously been considered and rejected by this Court.

In State v. Howell, Utah, 649 P.2d 91 (1982), the defendant, faced with charges of first- and second-degree murder and attempted murder, chose to oppose instructions on the lesser included offenses of manslaughter and attempted manslaughter in the hope of escaping all criminal liability. This Court, in determining that the trial court could properly instruct on the lesser included offense, said:

> If one were to view a trial as a strictly adversarial contest or combat between two parties, one could argue that a defendant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> should have the right to win or lose solely on the basis of what the prosecution has charged. However, a criminal trial is much more than just a contest between the State and an individual which is determined by strategies appropriate to determining the outcome of a game. A primary purpose of a criminal trial is the vindication of the laws of a civilized society against those who are guilty of transgressing those laws.
>
> . . .
>
> [W]hen evidence of a defendant's criminal conduct has been placed before a court of justice, even though that conduct has not been specifically charged, it would be a mockery of our criminal laws for a court to ignore a proved crime and acquit on the charged crime, when the defendant is not prejudiced in presenting a full and complete defense to the proved crime.

Id. at 94, 95. The Court went on to say that:

> Under the Utah definition of a lesser included offense, there can be no unfairness to the defendant in giving a lesser included offense instruction because of lack of notice or preparation since no element may be included in the lesser offense that is not included in the greater offense [citations and footnote omitted].

Id. at 95. Thus, the Court held that it is proper for a trial court to give a lesser included offense instruction, even though the defendant objects, if he is afforded a "full and fair opportunity to defend himself." Id. In the instant case there was no jury to instruct; however, it is also proper for a judge, sitting as the fact finder, to consider a lesser included offense when the circumstances of the case indicate

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

that the defendant may be guilty of the lesser offense even though he is not guilty of the offense charged.

Appellant further claims that the consideration of the lesser offense in this case twice placed him in jeopardy for the same offense. However, that proposition does not apply to the facts of this case. It cannot be said that appellant was placed in double jeopardy where he was not acquitted of the charge of manslaughter and then recharged in a new information with that same offense. Rather, the appellant here was found guilty of a different, lesser offense than that charged, albeit on the same set of facts, within the same proceeding and without a new information. To hold that the finding of guilt in this case constituted double jeopardy would be to hold that no defendant could ever be found guilty of a lesser included offense because the fact finder must first find him not guilty of the offense charged. Such a result flies in the face of the concepts of justice and fair dealing accepted by our courts. See, generally, State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937); Green v. United States, 355 U.S. 184 (1957).

Appellant further claims that respondent's brief in State v. Boggess, Utah, 655 P.2d 654 (1982), supports his position that the trial court may not consider a lesser included offense absent a specific request by the defendant. That case, however, arose in a different context from the case at bar. In Boggess, the defendant did not request an

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

instruction on the lessr included offense and none was given. On appeal, the defendant claimed that it was error not to consider a lesser offense in such a situation. Boggess, therefore, is not apposite to this case.

POINT II

NEGLIGENT HOMICIDE IS A LESSER OFFENSE INCLUDED IN THE OFFENSE OF MANSLAUGHTER.

Utah Code Ann., § 76-1-402 (1953), as amended, sets out the requirements for lesser included offenses. That section provides, in pertinent part:

> (3) A defendant may be convicted of an offense included in the offense charged . . . An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged.

Appellant argues that a comparison of the elements of manslaughter with the elements of negligent homicide results in a finding that negligent homicide is not a lesser offense in manslaughter. Such a comparison, however, results in a finding that the difference between the two offenses is merely one of degree rather than substance. The elements of manslaughter are as follows:

> (1) Criminal homicide constitutes manslaughter if the actor:
> (a) Recklessly causes the death of another; or

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> (b) Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse;
>
> (c) Causes the death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

Utah Code Ann., § 76-5-205 (1953), as amended. Negligent homicide is defined as follows:

> (1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

Utah Code Ann., § 76-5-206 (1953), as amended. Appellant first contends that negligent homicide cannot be a lesser included offense of manslaughter because subsections (b) and (c) of the manslaughter statute require proof of facts other than reckless conduct. There is nothing, however, in the Utah Code that prevents one definition of a crime from including lesser offenses that are not included within the alternate definitions of the greater offense. While negligent homicide might not properly be considered where the facts of a particular case support either alternative (b) or (c) of § 76-5-205, the facts of this case support only alternative (a). There was nothing at trial that showed appellant suffered from extreme mental or emotional disturbance or that appellant felt justified in the shooting death of Nina Fuelleman. Therefore,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

only alternative (a) need be considered in a comparison of the two offenses.

The difference between the two offenses is that manslaughter requires the actor to act recklessly and negligent homicide requires criminal negligence. These two terms are defined as follows:

> A person engages in conduct:
> . . .
> (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
>
> (4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Utah Code Ann., § 76-2-103 (1953), as amended. The only difference between reckless and criminally negligent conduct is whether a person perceives a risk and consciously disregards it or fails to perceive a risk he ought to have

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

been aware of. The risk in both cases must be of such a degree that an ordinary person would not disregard or fail to recognize it. The distinction, then, is merely a matter of proof of less or more facts establishing the mental state of the actor and is one of degree; i.e., perception and disregard or failure to perceive.

Appellant next cites State v. Howard, Utah, 597 P.2d 878 (1979) as standing for the proposition that negligent homicide is not a lesser offense included in manslaughter. That, however, is not the holding of the case. In Howard, this Court said that the failure to instruct on the lesser included offense of negligent homicide was not error because it was not supported by any reasonable view of the facts in that case. This holding does not rule out the inclusion of negligent homicide as a lesser offense in other cases, only in that case.

Last, appellant cites to respondent's brief in State v. Boggess, supra, to support his position that negligent homicide is not a lesser included offense. Although the respondent's brief in that case made a similar argument, it is not applicable in the instant case. This Court decided Boggess on September 13, 1982, and specifically declined to decide whether negligent homicide is a lesser included offense because no "reasonable view of the evidence as to defendant's intent . . . [would] support a verdict of guilty of negligent homicide." Boggess at 655. Justice Stewart, in his

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

concurring opinion, however, argued that negligent homicide is a lesser included offense of manslaughter. He said that:

> The gravamen of the crime of negligent homicide is the same as that for reckless manslaughter. The only distinction between the two crimes is the mental state of the defendant at the time the crime was committed. In one, the actor perceives the risk but unreasonably disregards it; in the other, he simply negligently fails to perceive the risk.
> . . .
> Courts generally have held that negligent homicide is a lesser included offense of reckless manslaughter. E.G., State v. Parker, 128 Ariz. 107, 624 P.2d 304 (1980); Lowe v. State, 264 Ark. 205, 570 S.W.2d 253 (1978); Till v. People, Colo., 581 P.2d 299 (1978); State v. Smith, Conn. 441 A.2d 84 (1981); People v. Strong, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1975); State v. Cameron, 121 N.H. 348, 430 A.2d 138 (1981); Aliff v. State, Tex. Cr. App., 627 S.W.2d 166 (1982). See State v. Mattingly, 23 Or. App. 173, 541 P.2d 1063 (1975).

Boggess at 656, Stewart, J. (concurring). In a further clarification, Justice Stewart stated that:

> The difference between negligence and recklessness is not marked by a sharp analytical line. On the contrary, the difference generally lies in making a judgment as to where on a continuum of unreasonable conduct one's behavior passes from negligence to recklessness. In essence, it is a matter of judging when conduct is no longer just gray but dark gray.

Id. at 658. Because the difference in proof of negligent homicide and manslaughter lies merely upon the mental state

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of the actor, the former is a lesser offense included within the latter. Both offenses require proof of the same facts outside of the mental state. The mental state required for negligent homicide is different from that required for manslaughter only in degree of perception of the risk. For this reason, it was proper for the trial judge, sitting as a fact finder, to consider negligent homicide as a lesser included offense in this case.

POINT III

THE EVIDENCE IS SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY TO THE CHARGE OF NEGLIGENT HOMICIDE.

Lastly, appellant contends that the evidence presented at trial is insufficient to justify his conviction of negligent homicide as a matter of law. This contention presumes that the fact finder must believe the evidence most favorable to appellant and ignore that which was unfavorable. The mere existence, however, of conflicting evidence or inferences is not sufficient to overturn a conviction. It is the finder of fact who is entitled to determine the credibility of witnesses and weight of the evidence. The evidence need not be "wholly conclusive" but need only be sufficient to support a finding by this Court that "reasonable minds would [not] entertain a reasonable doubt as to guilt." See State v. Howell, Utah, 649 P.2d 91, 97 (1982); and cases cited therein.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Clearly, there is sufficient evid nce in this case to support the verdict. That evidence is that: (1) Appellant knew that Nina Fuelleman was somewhere in the house during the argument between Rob and himself because the three had come home together (R. 285-288); (2) immediately following the argument, appellant went to his bedroom and took out the rifle (R. 291-292); (3) live ammunition was found near where appellant was standing when the gun fired, supporting the inference that appellant loaded the gun or knew it was loaded (R. 241); (4) appellant was pointing the gun in the direction of his brother when it fired (R. 312); (5) the gun could not have fired unless the trigger were pulled with a conscious effort (R. 263); (6) the rifle was held at or near the shoulder, supporting the inference that appellant was aiming or attempting to aim the gun when it fired (R. 297; see also Exhibits 17, 18 and 19); (7) appellant lied to the police about why he was holding the gun, supporting the inference that the gun did not fire accidentally (R. 209, 300); and (8) the gun was fired while appellant held it, killing Nina Fuelleman (R. 294, 297).

From these facts, the trial court could very well have determined that if appellant was not aware of the risk that Nina Fuelleman would be killed by the discharge of the rifle, he should have been aware of that risk. Even if appellant was not aware of the risk that the gun was loaded, he should have been aware of that risk and therefore of the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

further risk that the gun would fire and someone might be killed. Reasonable minds could not entertain a reasonable doubt that appellant was guilty of negligent homicide in failing to perceive such a risk. For this reason, the judgment of the trial court should be affirmed.

CONCLUSION

It is within the trial judge's discretion to consider a lesser included offense where the interests of justice require it, even though the defense counsel does not request such a consideration and even though he may object. Because negligent homicide is a lesser offense included within the offense of manslaughter and there was sufficient evidence to support a finding of guilty of negligent homicide, the trial court did not err in considering negligent homicide as the offense of which appellant was guilty nor in finding him guilty. For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted this 30th day of March, 1983.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius for

ROBERT N. PARRISH
Assistant Attorney General

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Ronald R. Stanger, Attorney for Appellant, 42 North University Avenue, P.O. Box 477, Provo, Utah, 84601, this 30 day of March, 1983.

Susan Patton

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.